Supreme Court, U.S.
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No. 91-7580

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION,
Respondent

BRIEF OF PATRICK F. ROGERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Are the mitigating circumstances for which the Eighth Amendment requires Texas to provide an additional vehicle, beyond the former Texas Special Issues, for a sentencing jury to express its "reasoned moral response" narrowly limited, as a matter of law, to "uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own?" Graham v. Collins, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc).

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INTEREST OF AMICUS CURIAE

This brief amicus curiae is submitted pursuant to Rule 37.2 of the Rules of this Court and is filed in support of Petitioner.[1]

The amicus, Patrick F. Rogers, stands convicted of capital murder and sentenced to death by the State of Texas. Rogers was tried and sentenced prior to this Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989), under the same Texas capital sentencing procedures at issue in Penry and this case. Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon 1981).

At trial, Rogers, who was 21 years old at the time of his crime, presented evidence that his life changed for the worse during the year before his crime due to his use of drugs, principally PCP and marijuana. There was overwhelming evidence that Rogers was intoxicated from ingestion of PCP at the time of his crime. In Rogers' state court application for habeas corpus relief, he asserted that the evidence of his drug use and intoxication at the time of the crime was mitigating evidence beyond the scope of the Texas Special Issues and that it was "two-edged sword" evidence such as that described by this Court in Penry. 492 U.S. at 323-24.

With three judges dissenting, the Texas Court of Criminal Appeals denied post-conviction relief on Rogers' claim based on Penry. Ex parte Rogers, 819 S.W.2d 533 (Tex. Crim. App. 1991). The dissenting judges would have granted relief because Rogers' evidence of drug addiction and intoxication had mitigating value

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[1]The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 37.2 of the Rules of this Court.

beyond the scope of the Texas Special Issues. 819 S.W.2d at 534-37 (Clinton, J., dissenting). Rogers has filed a petition under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Texas.

REASONS FOR GRANTING THE WRIT

This Court has held that " . . . in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394 (1987) (emphasis added). In Penry, this Court held that whether the Texas sentencing procedure is constitutionally applied depends, in each case, on whether the Special Issues allow the jury to consider, and give effect to, all pertinent mitigating evidence about the particular offender and particular offense. 492 U.S. at 319-28.

In the case below, the Fifth Circuit departed from this Court's decisions and adopted, as a matter of law, an exceedingly underinclusive test for determining whether the Eighth Amendment requires Texas to supply another vehicle, beyond the former Special Issues, for a sentencing jury to express its "reasoned moral response" to the particular defendant and the circumstances of the crime. According to the Fifth Circuit, the Eighth Amendment requires an additional instruction or jury question on mitigation only when "some major mitigating thrust" of the evidence is "substantially beyond" the scope of all of the former Special Issues. Graham v. Collins, 950 F.2d at 1026-27 (Slip op. at 2019).

The Fifth Circuit then announced a uniquely restrictive specification for the only type of mitigating evidence that can

meet its test. The Fifth Circuit held that another instruction or question is required only when there is substantial evidence of " . . . uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own." 950 F.2d at 1029 (Slip op. at 2022).

By loading limiting modifiers into its definition of the mitigating evidence for which the Eighth Amendment requires relief--"uniquely severe," "permanent," and "no fault of his own"-- the Fifth Circuit swept aside this Court's decision in Penry as a precedent with which the lower courts must deal in Texas death penalty cases. In effect, the Fifth Circuit negated Penry by restricting it to the specific facts of Penry's case.

The Fifth Circuit's opinion in Graham cuts deeply into this Court's Eighth Amendment jurisprudence. By limiting so

narrowly the mitigating evidence to which Penry applies, the Fifth Circuit placed numerous mitigating circumstances beyond Eighth Amendment analysis. For example, the Fifth Circuit has already applied Graham to foreclose consideration of whether evidence of voluntary intoxication at the time of the crime has mitigating force beyond the scope of the Texas Special Issues. Cordova v. Collins, 953 F.2d 167, 169-70 (5th Cir. 1992).

Further, because the Fifth Circuit limits Penry to "uniquely severe permanent handicaps," no evidence of curable mental or emotional disabilities, no matter how severe, can necessitate an additional question or instruction on mitigation. This conflicts with the manner in which other courts have interpreted Penry. See Gribble v. State, 808 S.W.2d 65, 75-76 (Tex. Crim. App. 1990), cert. denied, 111

S.Ct. 2856 (1991) (requiring an additional mitigation instruction to allow the jury to consider and give effect to evidence of "severe mental illness, depression, and psychotic delusions"); Smith v. McCormick, 914 F.2d 1153, 1166-69 (9th Cir. 1990) (requiring an instruction to allow a Montana jury to consider whether defendant's ingestion of large quantities of LSD and alcohol on the day of the offense should mitigate a sentence of death); cf. Toole v. State, 479 So.2d 731, 733-34 (Fla. 1985) (pre-Penry decision requiring an instruction to allow a Florida jury to consider evidence that defendant suffered from pyromania).

This Court should not allow its decision in Penry to be trivialized, as the Fifth Circuit has done. This Court found Penry's mental retardation to be outside the scope of Special Issue No. 1, which

inquires whether the defendant acted "deliberately," because "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" Penry, 492 U.S. at 322. Justice O'Connor explained, for the Court:

> A rational juror at the penalty phase of the trial could have concluded, in light of Penry's confession, that he deliberately killed Pamela Carpenter to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or evaluate the consequences of his conduct, . . . that same juror could also conclude that Penry was less morally "culpable than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood.

492 U.S. at 322-23.

This Court also found Penry's mental retardation relevant to Special Issue No. 2, because the evidence suggested an affirmative answer to the question "whether there is a probability that the defendant

would commit criminal acts of violence that would constitute a continuing threat to society." The Court observed that without an additional instruction or question allowing the jury to consider the mitigating effect of Penry's retardation, such evidence became, within the context of the Texas Special Issues, a "two-edged sword." The evidence "may diminish [a defendant's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." Penry, 492 U.S. at 324.

The holding of Penry clearly reaches beyond the narrow limits to which the Fifth Circuit has confined it. The Fifth Circuit's severe limitation of the types of evidence to which Penry applies pretermits individualized consideration by the lower federal courts of meritorious Eighth

Amendment claims, including claims such as that presented by amicus Rogers.

The principal defensive theory during the sentencing phase of Rogers' trial was that Rogers was in a drug-induced stupor at the time of his crime.[2] A psychiatrist testified that Rogers used PCP, in combination with marijuana, during the hours before the crime. The doctor testified that PCP, even in single doses, can cause individuals to "behave or carry on their activities in an illogical manner and in a manner in which they are detached from reality and the person will act as if they are unaware of the consequences of what they do." The doctor opined that the shooting for which Rogers was convicted was

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[2]This Court has held that in capital cases, sentencing juries must be allowed to consider, as a mitigating circumstance, the influence of drugs and alcohol. Roberts v. Louisiana, 431 U.S. 633, 637 (1977).

one act in a series of "bizarre, detached behavioral events in which Rogers wouldn't be aware of the consequences . . . and wouldn't be able to assess quality to it, either good or bad or any moral quality to it."

Eyewitnesses testified that Rogers acted strangely on the morning of the shooting by "hopping up on top of his tip-toes, just sort of in a jump, like a dance." Other witnesses to the shooting said that Rogers "just started shooting, jumping up and down," and that he "shot with his right hand and then . . . took both hands and just sort of danced around."

Following this Court's opinion in Penry, a reasonable juror could have found that although Rogers acted "deliberately," he acted while his judgment and inhibitions were suspended by PCP, and thus did not deserve a death sentence. Rogers' jurors

were given no vehicle by which to express that second thought. See Ex parte Rogers, 819 S.W.2d at 536-37 (Clinton, J., dissenting).

As in Penry, Rogers' mitigating evidence of drug use and drug intoxication was also "two-edged." The jury likely thought that the evidence that Rogers used PCP and committed violent acts while using PCP pointed forcefully to "yes" as the answer to the question whether Rogers would commit future acts of violence. In fact, the prosecutor emphasized that point in closing argument to the jury by arguing that Rogers' drug use "is another series of criminal acts this man has continued to commit against society" and that the jury should not use the evidence as a mitigation in Rogers' favor. He also stated that "you can predict from all of this that he's

going to commit further acts of violence. It's obvious. It's clear."

Further, in the sentencing phase, Rogers' prosecutor also focused the jurors on the literal questions posed by the Special Issues and warned them against giving the evidence <u>independent</u> mitigating effect. The prosecutor argued:

> You took an oath that the fact that death or life imprisonment might be imposed would not effect any deliberations of yours. <u>In other words, you cannot let the effects of your answers dictate how you answer the questions.</u>

(Emphasis added). <u>Compare Penry</u>, 492 U.S. at 325-26.

The former Texas Special Issues were not sufficiently broad to permit Texas juries, in every case, to consider and give effect to all relevant mitigating evidence that a defendant might present, as required by the Eighth Amendment. In <u>Penry</u>, this Court held that when the Special Issues,

reasonably read, do not allow the jury fully to consider and give effect to all of the mitigating evidence, and especially when the mitigating evidence is "double-edged," the Eighth Amendment requires something more.

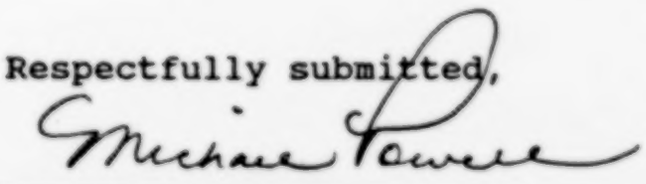
<u>Amicus</u> Rogers' case presents one example of mitigating circumstances that are within this Court's decision in <u>Penry</u>, but outside the Fifth Circuit's narrow holding in <u>Graham</u>. Rogers' case illustrates the extreme underinclusiveness of the decision below.

CONCLUSION

This case is of substantial importance to the nation's death penalty jurisprudence. It was decided below by the <u>en banc</u> Fifth Circuit, and the issues are focused by the sharply-divided majority and dissenting opinions. For the reasons stated in those dissenting opinions, this

brief, and the Petition for Writ of Certiorari, amicus curiae Patrick F. Rogers requests the Court to grant a writ of certiorari and reverse the decision of the Fifth Circuit.

Respectfully submitted,



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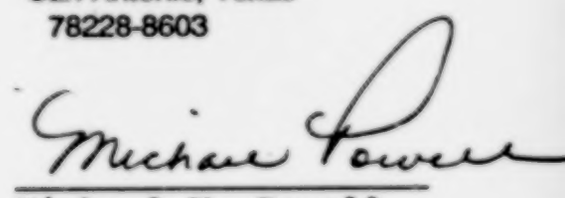

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